No. 340

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1961

No. 15672

J. PAUL SCOTT, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT L. STEPHENS

WESTERN LAW BOOK CO., INCORPORATED, COLUMBUS 15

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement	2–4
Reasons for Granting the Writ	5–7
Conclusion	7–8
Appendix A	9–13
Amendment VI	9
Opinion	10

CITATIONS.

Cases:	PAGE
Brubaker v. Dickson, 310 Fed. 2d 30	5
Von Moltke v. Gillies, 332 U. S. 708, 68 Sup. Ct. 316, 92 L. Ed 308	5
Statutes:	
18 USC 641	2
18 USC 2113	2
28 USC 1254 (1)	1
28 USC 2255	5
Constitution:	
United States Constitution, Amendment VI	2, 9

IN THE

SUPREME COURT OF THE UNITED STATES

——— Term. 1964.

No. 15672

J. PAUL SCOTT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, J. Paul Scott, respectfully prays that this Honorable Court cause a Writ of Certiorari to be issued to review the final Order and Judgment of the United States Court of Appeals for the Sixth Circuit, which judgment was entered on June 26, 1964.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at ——— Fed. 2d ———.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on June 26, 1964. A copy of the opinion is appended to this petition and appears in the Appendix at page 10, hereof. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED.

Your Petitioner entered a plea of guilty on January 31, 1957, to a charge of bank robbery, 18 USC 2113, and a charge of unlawful possession of machine guns, 18 USC 641. He received the maximum sentence of thirty (30) years. This plea was entered with the "advice" of counsel. The only question involved is

> (1) Whether or not, at the time Petitioner entered his plea of guilty, he did so with the effective assistance of counsel, as is guaranteed by the Sixth Amendment to the United States Constitution.

Both the District Court (Eastern District of Kentucky, at Lexington) and the Circuit Court of Appeals answered this question in the affirmative.

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Amendment No. VI, which is set forth in the Appendix at page 9.

STATEMENT.

The Petitioner, J. Paul Scott, instituted this proceeding on February 7, 1963, under 28 USC 2255, by moving the District Court to vacate the conviction and judgment upon count 1 and count 2 of Indictment No. 8730 filed against him on January 15, 1957, on the ground that his convictions were obtained in violation of Amendments V and VI of United States Constitu-

tion in that he did not have the effective assistance of counsel.

The first count of Indictment No. 8730 charged that Don Roderick Scott, Petitioner J. Paul Scott and Earl Franklin Morris "did unlawfully conspire to commit an offense against the United States, to-wit, to unlawfully and by force enter the Farmers and Traders Bank, Campton, Kentucky, with intent to commit larceny therein; said bank being duly and legally authorized and chartered under the laws of the State of Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation under Certificate No. 288."

The second count of the Indictment charged that on the 6th day of January, 1957, Don Roderick Scott, Petitioner J. Paul Scott and Earl Franklin Morris "did unlawfully and by force enter the Farmers and Traders Bank, Campton, Kentucky, with intent to commit larceny therein, which bank was duly and legally authorized and chartered under the laws of the State of Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation under Certificate No. 288, in violation of the laws of the United States."

On January 31, 1957, Petitioner was arraigned and entered pleas of guilty to both counts of the Indictment. Sentence of five (5) years imprisonment was imposed on count 1 and twenty-five (25) years imprisonment on count 2, with the provision that they be served concurrently.

The Petitioner and his brother and co-defendant, Don Roderick Scott, were accompanied by Mr. H. M. Grigsby, an attorney of Springfield, Kentucky, their home town, and, upon inquiry by the Court, each of them represented to the Court that Mr. H. M. Grigsby was representing them as their attorney. The Petitioner, upon separate inquiry, represented to the Court that his attorney, Mr. Grigsby, had explained to him the charges contained in the Indictment, that he understood the charges on which he entered his plea of guilty and that he was not induced to enter such plea by any promise or assurance of any kind from any person and he was pleading guilty to the charges of his own free and voluntary accord.

The present proceeding came on for hearing before the District Court on July 29, 1963. At this hearing the Petitioner was present in person, having been brought from the prison where he is now confined, in order that he might testify in person on his own behalf. He was represented by Mr. Robert F. Stephens, a member of the Fayette County, Kentucky, Bar Association, who had been appointed by the Court for that purpose on February 7, 1963. The Petitioner testified at length and repudiated the statements he made to the Court at the arraignment, to show that he did not, in fact, understand the charges, and, in fact, had no effective assistance of counsel at the time he entered a plea.

REASONS FOR GRANTING THE WRIT.

This Court is the last chance that this Petitioner has to see that his right to the effective assistance of counsel, as guaranteed by our Constitution, is protected. Time and time again this Court, and other Federal Courts, set out the facts necessary to satisfy this basic constitutional requirement.

In the famous case of Von Moltke v. Gillies, 332 U. S. 708, 68 Sup. Ct. 316, 92 L. Ed. 308, Mr. Justice Black stated that, *prior to trial*, an accused is entitled to rely upon his counsel to make an independent examination of:

1. The facts and circumstances.
2. The pleadings.
3. The law.

In the case of Brubaker v. Dickson, 310 Fed. 2d 30, the Court stated that when a petitioner, under provisions of 28 USC 2255, alleges a lack of effective counsel, the critical tests are as follows:

1. Did the defendant have a possible defense which was presented?
2. Did defendant's counsel consult sufficiently with him?
3. Did defendant's counsel adequately investigate the facts?
4. Did defendant's counsel adequately investigate the law?

Right to counsel means *conscientious* service of an attorney, and not a perfunctory performance appearance.

In this case, the record before this Court shows clearly that the Petitioner, himself, testified that he did not understand the nature of the charges, that he was under pressure by his family to plead guilty, that he did not consult with the attorney who "advised" him to plead guilty, and that he did have a defense. Petitioner's testimony is corroborated by a co-defendant.

More importantly, however, is the testimony of that attorney, himself, as elicited at the trial of this cause before the District Court. By that testimony, the following *facts* appear which are pertinent and controlling to the question herein involved. They are as follows:

1. That in 31 years of law practice, he had only one criminal case in Federal Court.
2. That he was not familiar with Federal statutes or Federal criminal procedure.
3. That he failed to read the specific statutes under which Petitioner was charged
4. That he failed to do any legal research.
5. That he only talked a few minutes with Petitioner about the facts.
6. That his representation of the Petitioner was conditioned upon a plea of guilty being made.
7. That he made no statement to the Trial Judge on behalf of Petitioner.
8. That he made *no* formal preparation for the case.
9. That he never explained the charges, in detail, to the Petitioner.

10. That he never considered the possibility of a defense.
11. That he never told Petitioner of the maximum penalties involved.

This evidence is undisputed and comes from the attorney, himself. It is before this Court in the certified record. The Circuit Court of Appeals simply *ignored* this testimony in its decision.

The writer of this petition is not attacking, as the Circuit Court said, "errors which may have been made by counsel." What is being attacked is the fact that, *by his own testimony*, the attorney who advised Petitioner to plead guilty, did so without one iota of preparation—factual or legal. This is certainly an error—but it is far more than that. It is simply a complete lack and failure to render that type of assistance required by our Constitution.

CONCLUSION.

The writer of this petition is Court appointed and has been, from the moment the initial petition to vacate sentence was filed. The writer is aware that much public feeling exists against this Petitioner, and is further aware that this proceeding is not the first attempted by Petitioner. However, the facts simply cannot be denied. The attorney gave petitioner the advice to plead guilty and did so without any preparation of any kind. His testimony—*which is undisputed*—clearly proves this. It is hoped that this Court will not simply accept the findings of fact of the lower

court that Petitioner was afforded "conscientious assistance." It is hoped that this Court will consider the *facts*, as set out in the record and will apply the law as set out. If so, Petitioner is confident that this writ will be granted.

For the reasons set out above, petitioner respectfully submits that this petition for Writ of Certiorari should be granted.

ROBERT F. STEPHENS,
601 Security Trust Building,
Lexington, Kentucky,

Attorney for Petitioner.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15672

J. PAUL SCOTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL from the United States District Court for the Eastern District of Kentucky at Lexington.

Decided June 26, 1964.

Before: MILLER and EDWARDS, Circuit Judges, and BROOKS, District Judge.

PER CURIAM. The appellant, J. Paul Scott, instituted this proceeding in the District Court under Section 2255, Title 28, United States Code, on February 27, 1963, to vacate the judgments entered under two counts of an indictment charging him and others with conspiracy to unlawfully enter the Farmers and Traders Bank at Campton, Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation, with intent to commit larceny therein, and also with the substantive offense. The judgments were entered on January 31, 1957, following pleas of guilty. Appellant was represented by counsel selected and employed by his father. The alleged ground for the motion to vacate is that in pleading guilty he did not have the effective assistance of counsel, guaranteed by the Sixth Amendment to the Constitution of the United States.

On July 11, 1960, about three and one-half years after the imposition of sentence, appellant, while serving his sentences at Alcatraz, moved to withdraw his pleas of guilty pursuant to Rule 32(d), Rules of Criminal Procedure, and Section 2255, Title 28, United States Code, on the ground that at the arraignment he was without effective assistance of counsel and he was under the influence of drugs, which rendered him incapable of understanding the consequences of his act, and that his pleas were obtained by fraud, trickery and deceit.

The transcript of the proceedings on arraignment showed that the appellant was personally questioned by the District Judge and stated to the Court that his counsel had carefully explained to him the charges, and that he was pleading guilty of his own free and voluntary accord after he understood the charges. The District Judge ruled that the files and records of the Court showed that the appellant was not entitled to relief and denied the motion without a hearing. The judgment was affirmed by this Court at 292 F(2) 49. Certiorari was denied by the Supreme Court at 368 U. S. 879.

On September 22, 1961, appellant filed in the District Court his motion for Arrest of Judgment and Vacation of Sentence under Rule 34, Rules of Criminal Procedure, wherein he alleged that the indictment was insufficient to constitute an offense under the statute. The Court ruled that the motion was not seasonably filed, but treated it as a proceeding to vacate sentence under Section 2255, Title 28, United States Code. The motion was denied, which ruling was affirmed by this Court at 304 F(2) 706.

The District Judge held a hearing in the present proceeding with court-appointed counsel representing the appellant. The attorney who represented the appellant at the arraignment testified. Appellant strongly relies upon certain statements made by him, which he contends showed

that he did not render the type and quality of legal service which an attorney owes to a client. However, in this collateral attack on the judgments, the test is not a consideration of the errors which may have been made by counsel in his representation of a defendant. The Supreme Court in applying the test has never undertaken the duty of appraising the quality of the defense attorney. Only if it can be said that what was or was not done by the defendant's attorney for his client made the proceeding a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail. The fact that a different or better result may have been obtained by a different lawyer does not mean that the defendant has not had the effective assistance of counsel. *Mitchell* v. *United States*, 259 F(2) 787, 789-791, C. A. D. C., cert. denied, 258 U. S. 850; *O'Malley* v. *United States*, 285 F(2) 733, C. A. 6th; *Anderson* v. *Bannan*, 250 F(2) 654, C. A. 6th.

The District Judge in his overall evaluation of the situation found as the facts that appellant's chosen attorney representing him on the charges now under consideration was a competent lawyer of high standing at the Bar of Kentucky, was qualified to represent appellant as his attorney and afforded appellant conscientious assistance as his attorney, and that the appellant understood the charges against him and entered his plea of guilty thereto of his own free will and accord. We accept these findings of the District Judge as being supported by the evidence.

The present proceeding is the third proceeding under Section 2255, Title 28, United States Code, reviewed by this Court, in one of which one of the grounds of relief was the alleged failure to have the effective assistance of counsel, the same ground relied upon in this proceeding. Section 2255, Title 28, United States Code, provides:

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

For that reason, also, the District Judge would have been justified in dismissing the petition. *United States v. Orlando*, 327 F(2) 185, 188, C. A. 6th; *Dunn v. United States*, 234 F(2) 219, 221, C. A. 6th, cert. denied, 352 U. S. 899; *Howard v. United States*, 199 F(2) 276, 278, C. A. 8th.

The judgment of the District Court dismissing the petition is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 340

J. PAUL SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1964. The petition for a writ of certiorari was filed on August 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record supports the finding of the district court, after a hearing, that petitioner had not shown ineffective assistance of counsel at the time he pleaded guilty.

STATEMENT

On January 31, 1957, in the United States District Court for the Eastern District of Kentucky, petitioner pleaded guilty to two counts of an indictment charging him and others with conspiracy to enter, and entry of, a federally insured bank with intent to commit larceny therein (R. 8).[1] He was sentenced to imprisonment of 5 years on one count and 20 years on the remaining count, the terms to run concurrently.

The transcript of record at the time of arraignment shows that petitioner assured the court that he was represented by the counsel who accompanied him; that this counsel had carefully explained the charges to him; that he understood them; and that he was freely and voluntarily entering the pleas of his own accord and without inducement of any kind (R. 8, 90). The record also shows that, upon allocution, petitioner stated that he realized the charges were "very serious" and requested leniency (R. 90).

On July 11, 1960, about 3½ years after sentence, petitioner moved to withdraw his pleas of guilty

[1] At the same time a ten-year sentence was imposed (to run consecutively to the terms imposed on the bank robbery counts) upon petitioner's plea of guilty to a second indictment charging theft of guns and ammunition from the United States and possession of two unregistered machine guns.

pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure and 28 U.S.C. 2255, on the ground that, at arraignment, he was denied the effective assistance of counsel, was under the influence of drugs and unable to understand the nature of the proceedings, and that his pleas were obtained by fraud, trickery and deceit. The district court denied the motion without a hearing on the basis of the files and record. The court of appeals affirmed (292 F.2d 49) and this Court denied a petition for a writ of certiorari (368 U.S. 879).

On September 22, 1961, a second motion (filed by petitioner as a motion in arrest of judgment under Rule 34, Federal Rules of Criminal Procedure, attacking the indictment) was treated by the district court as a proceeding pursuant to 28 U.S.C. 2255 and denied. Again the denial was affirmed on appeal (304 F.2d 706) and certiorari denied (371 U.S. 847).

Petitioner brought the present proceeding pursuant to 28 U.S.C. 2255 on February 27, 1963, alleging that he had been denied the effective assistance of counsel as required by the Sixth Amendment at the time of arraignment. The district court appointed counsel to represent petitioner and conducted a hearing (on July 29, 1963) at which evidence was adduced.

Petitioner testified, *inter alia*, that at arraignment he was surprised to see counsel (from his home town) whom his father had brought to the jail to see him twice during the two weeks prior to arraignment (R. 15-16). He said counsel had refused to discuss his case with him and had told him that the purpose of his visit was not to represent him, but to help his-

father reclaim a car used on the night of the robbery (R. 13-14, 23). Petitioner said that at the time of arraignment he had not been told by counsel of the nature of the proceedings or the charges, or the possible penalties (R. 15-16), and that he entered the pleas because of pressure from his father (R. 21). He said that, on the basis of research he had done in prison since incarceration, he was convinced that he had not committed a federal crime because he had merely broken into a bathroom of a building with intent to burglarize an office which incidentally was housed in the same building as a federally insured bank (R. 10, 20, 22-23).

Counsel who had represented petitioner at arraignment testified that, at the time he agreed with petitioner's father to represent petitioner, it was understood that petitioner was guilty and would enter a plea of guilty (R. 37, 39). Petitioner's own story (and that of his brother, a co-defendant) had convinced counsel of petitioner's guilt (R. 37, 38, 39). Counsel had discussed the facts with petitioner during several visits to the jail (R. 34, 35) and, after these discussions and discussions with others (R. 36), had reached the conclusion that petitioner had no valid defense (R. 37, 38). With respect to petitioner's present claim that he intended only to burglarize an office, counsel said this was the first time he had heard the story and added, "The guard was in the bank when he shot him [petitioner]" (R. 39). Counsel stated that he had done no "formal preparation" or research for the case (R. 35, 38). And he acknowledged that, in thirty-one years of law practice, this was the sec-

ond criminal case he had handled in the federal courts (R. 34). He said that he had obtained copies of the indictments "considerably" prior to arraignment and that he had read them. He did not recall specifically reading them to petitioner (R. 32) but he did explain the charges in detail (R. 38). He stressed the seriousness of the crime and advised petitioner of the severe penalties involved (R. 32, 38, 39).

In denying petitioner's motion the district court made specific findings of fact, including the following: that counsel was of petitioner's own choosing; that he was a competent and qualified lawyer of high standing who rendered conscientious assistance as an attorney; and that petitioner understood the charges against him and entered his guilty pleas of his own free will and accord.

ARGUMENT

Petitioner has had an evidentiary hearing on his allegation that he was denied effective assistance of counsel in entering pleas of guilty. The contrary findings of the district court are fully supported by the record.

That court properly concluded that petitioner consented to representation by counsel weeks prior to ar-

The rule has been stated as often as to be almost axiomatic that a charge of ineffective assistance of counsel cannot prevail unless the conduct of counsel is such as to make the proceedings "a farce and a mockery of justice" shocking to the conscience of the court. *See O'Malley v. United States*, 285 F.2d 733, 735 (C.A. 6); *Marshall v. United States*, 259 F.2d 787, 788 (C.A.D.C.), certiorari denied 358 U.S. 850; *Cooper v. United States*, 265 F.2d 686, 687 (C.A. 9).

raignment. There is nothing to show that counsel was not reasonably diligent. There was evidence that he investigated the facts, and that he satisfied himself, both on the basis of his talks with petitioner and by independent investigation, that petitioner had no valid defense. There was also evidence from which the court could conclude that petitioner's belated claim of a valid defense was a manufactured afterthought. Counsel was a practicing attorney of thirty-one years experience. The fact that he had not handled many criminal cases in the federal court obviously does not show incompetence.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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BEATRICE ROSENBERG,
JULIAN P. COOPER,
Attorneys.

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